90-1301

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GEORGE HADGES,

Petitioner,

v.

YONKERS RACING CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

Where privately owned Yonkers Racing Corporation operates Yonkers Raceway pursuant to a state issued license, is subject to pervasive state statutory and regulatory control, and has a mutually beneficial relationship with the state, did the conduct of Yonkers Racing Corporation in barring a state licensed owner, trainer and driver of standardbred race horses from working at Yonkers Raceway pursuant to authority delegated to it by state regulation amount to "state action" implicating a Fourteenth Amendment due process right to notice and some kind of hearing?

PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed here appear in the caption of the case.

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1990
No. _____

GEORGE HADGES,
Petitioner,

v.

YONKERS RACING CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is officially reported as *Hadges v. Yonkers Racing Corp.*, 918 F.2d 1079 (2d Cir. 1990), and appears in Appendix A hereto at 1a-21a. The opinion and order of the United States District Court for the Southern District of New York is officially reported as *Hadges v. Yonkers Racing Corp.*, 733 F. Supp. 686 (S.D.N.Y. 1990), and appears in Appendix C hereto at 23a-52a.

JURISDICTION

The opinion of the Second Circuit Court of Appeals was rendered on November 19, 1990. In accordance with Rules 13.1 and 13.4 of this Court, this petition is filed within 90 days of the date of rendering of the opinion of the Second Circuit. The jurisdiction of this Court is invoked under 28 U.S.C.

§1254 (1988) because the opinion of the Second Circuit decides an important question of federal constitutional law in a manner inconsistent with precedents of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional Provisions

The "Due Process" clause of the 14th Amendment to the United States Constitution, U.S. Const. amend XIV, §1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. Statutory Provisions

In its entirety, 42 U.S.C. §1983 (1988) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The important issue raised by this case is whether the action of a concededly private enterprise whose operations are licensed by the state and whose organization and corporate purposes are dominated and continuously supervised by the state because of the presence of otherwise illegal gambling activities on its premises, is "state action" for due process purposes when that organization deprives a person of the lawful exercise of a right separately licensed by the state.

This issue takes on national significance since the states are, with increasingly greater frequency, relying on lotteries and other gambling activities to raise revenues. When the state is the administrator of such gambling programs, there is no question that judicial scrutiny of purported due process violations is appropriate. The question is no less important when the administrative responsibilities for gambling activities are entirely delegated to a private organization whose corporate existence, purpose and operations are the subjects of pervasive, comprehensive and dominating state regulation. State-sanctioned gambling activity and the resultant mutual financial benefits flowing between the corporation and the state implicate a compelling "symbiotic relationship" between them and thus "state action" under this Court's cases.

A. Statement of Facts

Petitioner George Hadges ("Hadges") became licensed by the State of New York to own and train harness racehorses in 1972. At that time, he involved himself in the harness racing business at Yonkers Raceway (the "Raceway"), the track owned and operated by Respondent Yonkers Racing Corporation ("YRC"), located in Westchester County, New York, the county in which Hadges has continuously resided.

From 1972 through 1974 and from 1976 through January 4, 1989, Hadges worked at the Raceway. YRC conducts harness

racing and pari-mutuel wagering at the Raceway pursuant to a one-year renewable license granted it by the New York State Racing and Wagering Board ("NYSRWB"), the governmental organ with jurisdiction over all horse racing activities in New York. The Raceway is the only operating New York harness racing track in the New York City metropolitan area; Monticello Racetrack in Monticello, New York, is not comparable either in size or purse structure to the Raceway.

On January 5, 1989, Hadges' New York State harness license was suspended for six months, ostensibly the result of an alleged incident involving the passing of wagering information at Roosevelt Raceway (now closed) in 1986.[1] At the expiration of the suspension period, on July 5, 1989, Hadges' New York State license to drive, train and own standardbreds was reinstated by the NYSRWB. License restored, Hadges immediately sought to recommence his work at the Raceway.

Hadges' numerous requests for work were held in abeyance for months until late October 1989 when, following intervention by Hadges' attorney, YRC's General Manager agreed to meet alone with Hadges. At this meeting, Hadges was informed that YRC's response to his repeated requests to work was "thumbs down." YRC's General Manager gave no reasons for this decision and Hadges was afforded no hearing of any kind. YRC's General Manager did, however, offer Hadges the option of withdrawing his work request so the matter would be "kept quiet." It was implicit but clear to Hadges that if he failed to accept YRC's offer, the result would be an

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1. Hadges challenged this suspension on due process grounds even before the commencement of the suit at bar. *Hadges v. Corbisiero, et al.*, No. 89 CIV. 2012 (S.D.N.Y. 1989) (Goettel, J.). This case is pending.

effective blacklisting from the racing industry in New York State. Hadges rejected this offer and has not worked at any New York track since.

Approximately one week later, Hadges testified on behalf of a licensed driver during a preliminary injunction hearing (*Rejean Daigneault v. Yonkers Racing Corporation*, No. 89 Civ. 6725 (S.D.N.Y. 1989) (Goettel, J.)).[2] On his next visit to the Raceway, a security guard refused Hadges' entry and notified him that he was permanently barred from the track, even as a patron.

In recent years, Hadges had earned approximately $50,000 per year as a trainer and driver of standardbred horses and more as an owner. As a result of YRC's actions, Hadges has been denied his occupation and his livelihood. His license to own, drive and train standardbred horses in the State of New York has effectively been revoked.

B. Prior Proceedings

Hadges commenced this action in the United States District Court for the Southern District of New York alleging that his property and liberty rights had been deprived without due process by virtue of YRC's decision to bar him from the Raceway. In his complaint against YRC, Hadges sought injunctive relief and compensatory and punitive damages pursuant to 42 U.S.C. §1983 (1988), and he moved for a preliminary injunction.

YRC answered the complaint but cross-moved to dismiss Hadges' action or, in the alternative, for summary judgment, arguing that there existed no issue of material fact on the claim of state action. The District Court denied Hadges' application

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2. Plaintiff Daignealult also claimed he had been deprived of notice and a hearing prior to being barred from racing at Yonkers Raceway. The District Court later ruled that Daigneault was entitled to a due process hearing on contract grounds not applicable here.

for a preliminary injunction and granted YRC's cross-motion for summary judgment on the ground that ". . . there was no state action involved in YRC's decision to deny privileges to plaintiff." *Hadges v. Yonkers Racing Corp.*, 733 F. Supp. 686, 694 (S.D.N.Y. 1990); Appendix C hereto at 52a.

This holding was affirmed by the United States Court of Appeals for the Second Circuit. The Court of Appeals determined that Hadges had not sufficiently satisfied this Court's "symbiotic relationship" test or its "close nexus" test to establish state action in YRC's decision to bar Hadges from the Raceway as an owner-driver-trainer.

REASONS FOR GRANTING THE WRIT

THE SECOND CIRCUIT'S OPINION THAT THE CHALLENGED ACTION WAS NOT ATTRIBUTABLE TO THE STATE CONFLICTS WITH THE PRECEDENTS OF THIS COURT

In *Burton v. Wilmington Parkway Authority*, 365 U.S. 715 (1961), this Court held that a privately owned restaurant that leased its premises from a state parking facility was subject to Fourteenth Amendment constraints when it refused to serve a black man. The case at bar presents the same kind of relationship between the state and private enterprise this Court found controlling in *Burton*.

The comprehensive and penetrating governmental involvement in all of YRC's activities, rendered necessary from the state's perspective by the gambling present on YRC's premises, makes New York a sufficiently "joint participant in the enterprise" to warrant a conclusion that YRC's actions against Hadges are attributable to the state. YRC's state license to conduct harness racing is analytically equivalent to the lease the Burton court found dispositive. What makes this case even more compelling than *Burton* is the fact that in addition to the license it grants YRC, the state is involved in vir-

tually every aspect of YRC's business through extensive regulation and on-site supervision. That YRC may, by unreviewable fiat, effectively act to revoke a separate state issued license to an individual — a power reserved exclusively to the state — stands as powerfully incongruous as the "private" deprivation of a black man's right to eat where he chooses.

In New York, all gambling is illegal save that expressly authorized by the state constitution and statutes. 68 Op. Att'y Gen. 203 (1981).

> Undeniably, the public policy of the state, as exemplified in its Constitution (N.Y. Const. Art. I, Sec. 9[1]), prohibits gambling or lotteries except those operated by the State. . . . The policy of the State disfavors gambling, unless done in accordance with laws and regulations strictly complied with.

Pando By Pando v. Fernandez, 127 Misc.2d 224, 227 (Sup. Ct. N.Y. Co. 1984). New York's constitution authorizes "pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government." N.Y. Const., art. I, §9(1). *Finger Lakes Racing Association, Inc. v. New York State Racing & Wagering Board*, 45 N.Y.2d 471 (1978).

The enabling statutory provisions are consolidated in the State's Racing, Pari-Mutuel Wagering and Breeding Law. By this statutory scheme NYSRWB is delegated "general jurisdiction over all horse racing activities and all pari-mutuel betting activities, both on-track and off-track, in the state and over the corporations, associations, and persons engaged therein." N.Y. Rac. Pari-Mut. Wag. & Breed. Law §101[1].

Although YRC contends that it is a private corporation, the state, through the NYSRWB, reaches incisively into YRC's corporate structure and defines the limits of its ownership and the transfer of same. Further examples abound. Pursuant to the Racing, Pari-Mutuel Wagering & Breeding Law, YRC

must file with NYSRWB a statement containing the names, addresses and changes thereto of all its stockholders and the law provides specific guidelines concerning who shall own stock or any proprietary interest in YRC. In fact, the state reaches well beyond YRC by limiting YRC's shareholders from owning ten percent or more of the stock of any corporation that sells any goods or renders any services to YRC.

NYSRWB controls the manner in which YRC's accounts, records and books are kept, and the state maintains a complete discretionary power over YRC's accounting which is to be wielded "consistent[ly] with the powers of the state tax commission." *Id.*, §301[2][d]. Again, this power extends beyond YRC to any "corporation holding any concession, right or privilege to perform any service or sell any article at any [licensed] track." *Id.* NYSRWB prescribes the requirements for YRC's actual incorporation in New York and can direct specific stockholders of YRC to dispose of their stock or interests in YRC. N.Y. Rac. Pari-Mut. Wag. & Breed. Law §303[5].

All gambling at YRC is conducted under the strict supervision and control of the NYSRWB. The State Tax Commission is charged with the financial administration of gambling at the Raceway and it too possesses the power to prescribe the forms and system of accounting YRC must use, as well as to examine its books and records. *Id.*, §306, §316.

NYSRWB mandates the admission price charged to the public and New York law requires YRC to additionally collect an admission tax; all amounts so collected are deposited into the state treasury. *Id.*, §306. The law specifies the disposition of all betting pools, including provisions for generating state revenue and granting tax credits to YRC. *Id.*, §318.

YRC conducts its harness race meetings pursuant to a one-year renewable license issued by NYSRWB (*id.*, §307[2]—[4]) which specifies the location at, and the dates and hours

during which YRC may operate. YRC is empowered to appoint five or more special policemen "who, when appointed, shall be peace officers with the same powers within and about [YRC's] grounds as are set forth in section 2.20 of the criminal procedure law." *Id.*, §215. All persons participating in racing meets of YRC must be licensed by NYSRWB with their license fees paid into the State treasury. *Id.*, §309. Whether employed directly by YRC or simply operating on its grounds, the following persons must be licensed by the state: owners, trainers, drivers, assistant trainers, farriers, veterinarians, track management, grooms, food service personnel, cleaning service personnel, officials involved in wagering, security personnel, those involved in simulcasting races and those involved in general services.

NYSRWB rules and regulations also mandate appointment of state officials to act at all race meetings and they set forth specific requirements for the conduct of races and wagering at the Raceway. *See* 9 N.Y.C.R.R. §§4105.1-4105.16 and §§4108-4118.

A detailed analysis of the Racing, Pari-Mutuel Wagering & Breeding Law and the NYSRWB rules and regulations promulgated thereunder makes it abundantly clear that every facet of YRC's business is controlled by New York State, that YRC operates its Raceway pursuant to a New York State license, that it is the beneficiary of New York State tax credits and that it generates, through its operations, substantial revenue for New York State. This "symbiotic relationship," necessarily created and fostered by gambling activity, supports the presence of state action in an analytically identical way as this Court found state action in *Burton*. And as in *Burton*, Hadges suffered a constitutional deprivation committed under color of the state's license to YRC without benefit of due process protection, resulting in *de facto* revocation of his state-issued license to ply his trade.

The *Burton* court held there was a "symbiotic relationship" between the state parking authority and the restaurant because the lease engendered the mutual benefits which flowed between the state parking facility and the restaurant, and the state was recognized as a joint participant in the restaurant's discriminatory conduct because of this mutually beneficial relationship:

> It cannot be doubted that the peculiar relationship of the restaurant to the parking facility . . . confers on each an incidental variety of mutual benefits.
>
> * * *
>
> The State has so far insinuated itself into a position of interdependence with [the private company] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.

Id. at 724-725.

The *Burton* court recognized the necessity of a fact-bound inquiry to discern "nonobvious involvement of the State in private conduct." *Id.*, at 722. In the case at bar, exploration and analysis of the true contours of the mutually beneficial relations between the sovereign and the allegedly private actor has been precluded by the granting of YRC's cross-motion for summary judgment. Yet, it is conceded by YRC that its decision to bar Hadges was pursuant to power delegated to it by the state. YRC acknowledged in its submission to the District Court that 9 N.Y.C.R.R. §4119.8 grants it the absolute right to deny Hadges' racing privileges and access to the track without reason. The real effect of this regulation is that New York has delegated an unfettered discretion to YRC to bar Hadges from racing which the state, itself, could not exercise in the absence of notice and an opportunity to be heard. As this Court noted in its analysis of a state action question in

Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352-53 (1974):

> If we were dealing with the exercise by Metropolitan of some power *delegated* to it by the State which is traditionally associated with sovereignty, . . . our case would be quite a different one. (Emphasis added.)

See also, West v. Atkins, 487 U.S. 42 (1988).

YRC's exercise of its state delegated power to prohibit Hadges from racing at its track is tantamount to license revocation — unmistakably a power "traditionally associated with sovereignty." By permitting YRC to exercise such power, the state has "privatized" the performance of its duties and relieved itself of the responsibility of acting within constitutional limits.

Both the District Court and the Second Circuit rejected the *Burton* case as controlling precedent because, unlike the restaurant in *Burton* that operated under a lease with the state, YRC operates its track on privately owned property originally purchased and thereafter maintained by private rather than public dollars. Petitioner respectfully submits that the narrow analyses of these courts fail to embrace the essential point of *Burton*. The state lease in *Burton* merely provided the mechanism for the mutually beneficial and interdependent relationship between the restaurant and the state. It was the *relationship* — not the lease — that implicated the Fourteenth Amendment. The state's one year license to YRC, the regulatory machinery that gives rise to New York's involvement in virtually all the affairs of YRC and the mutual benefits that flow between the state and YRC, all combine to establish a true symbiotic relationship which the *Burton* court held implicates the Fourteenth Amendment. *See also, Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968).

In summary, as a result of a decision permitted and delegated by state regulation to be made behind closed doors without minimal due process protections, YRC has acted to deny

Hadges the exercise of his New York State license to drive, train and own standardbred horses at its Raceway. YRC's action has knowingly and effectively revoked that license within New York, depriving Hadges of his livelihood and income from a state-sanctioned activity. YRC's argument — that it acted to exclude Hadges pursuant to a "private" decision — is wholly contrary to the central idea of this Court's holding in *Burton*. The dominating and pervasive state regulation of virtually every facet of YRC's business operations and corporate affairs, the state license pursuant to which YRC operates, the nature and scope of the mutually beneficial relationship between YRC and New York, and YRC's barring of Hadges pursuant to authority delegated to it by the state, establishes the kind of symbiotic relationship between the state and private enterprise this Court has held implicates due process protections.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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February 12, 1991

Appendix A — Opinion of the United States Court of Appeals for the Second Circuit Dated November 19, 1990

George HADGES, Plaintiff–Appellant,

v.

YONKERS RACING CORPORATION, Defendant–Appellee.

No. 202, Docket 90–7380.

United States Court of Appeals, Second Circuit.

Argued Sept. 19, 1990.

Decided Nov. 19, 1990.

Driver, trainer and owner of horses brought civil rights action against racetrack which had excluded him. The United States District Court for the Southern District of New York, 733 F.Supp. 686, Gerard L. Goettel, J., rendered summary judgment for owner and driver appealed. The Court of Appeals, Oakes, Chief Judge, held that owner's exclusion of driver did not constitute state action for § 1983 purposes.

Affirmed.

1. Civil Rights ⇐198(4)

Private conduct qualifies as state action for § 1983 purposes when state has so far insinuated itself into position of interdependence with private party that it must be recognized as joint participant in challenged activity or when there is sufficiently close nexus between state and challenged action that private party's action may be fairly treated as that of state itself. 42 U.S.C.A. § 1983.

2. Civil Rights ⇐198(6)

Harness racehorse driver failed to show symbiotic relationship between state and private owner of racetrack licensed by state to conduct parimutuel wagering as would render owner's exclusion of driver state action for § 1983 purposes; state had neither proprietary interest in racetrack nor direct financial stake in racetrack's success. 42 U.S.C.A. § 1983.

3. Civil Rights ⇐198(6)

Harness racehorse driver failed to show that sufficiently close nexus existed between state and racetrack owner as would render owner's exclusion of driver state action for § 1983 purposes; owner did not act at behest of state official and was not enforcing violation of state racing law when he excluded driver, driver produced no evidence to support statement that power to exclude person for no reason from privately-owned racetrack was power traditionally associated with sovereignty and, even if owner had monopoly in metropolitan area, driver offered no credible evidence supporting assertion that his exclusion effectively revoked his license to work at harness racetracks in state. 42 U.S.C.A. § 1983.

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Before OAKES, Chief Judge, MESKILL, Circuit Judge, and RESTANI, Judge.*

OAKES, Chief Judge:

This appeal is from a judgment of the United States District Court for the Southern District of New York, Gerard L. Goettel, *Judge*, denying George Hadges's motion for a preliminary injunction and granting the cross-motion of Yonkers Racing Corporation ("YRC") for summary judgment. It presents an issue of first impression for this court: whether Yonkers Racing Corporation, as the private owner of a racetrack licensed by the State of New York (the "State") to conduct parimutuel wagering on harness races,[1] engaged in

* The Honorable Jane A. Restani, of the United States Court of International Trade, sitting by designation.

1. A harness race is a trotting or pacing race, usually run in the United States at a distance of one mile, for Standard bred horses harnessed to sulkies, which are light, two-wheeled carriages.

state action for the purposes of 42 U.S.C. § 1983 when it denied appellant's request to work at appellee's racetrack. We believe that the challenged action was not attributable to the State, and therefore affirm.

Appellant George Hadges ("Hadges") is a journeyman harness racehorse driver, trainer, and owner. Hadges filed the instant action pursuant to section 1983 alleging that appellee Yonkers Racing Corporation violated Hadges's Fourteenth Amendment right to due process when it denied Hadges's request to work at its racetrack in September, 1989. At the time Hadges made his request, he was licensed by New York and several other states to participate in harness racing. New York requires such a license before one can work at the racetracks in the State. N.Y.Comp.Codes R. & Regs. tit. 9, § 4101.24(b) (1985) (promulgated pursuant to N.Y.Rac. Pari–Mut. Wag. & Breed. Law § 309 (McKinney 1984 & Supp.1990)). During his racing career, Hadges has worked at all the New

York harness racetracks,[2] but primarily at Yonkers Raceway.

YRC, a closely held corporation, owns Yonkers Raceway. The corporation has invested $65 million in Yonkers Raceway since it purchased the racetrack in 1970. YRC operates the racetrack pursuant to a one-year renewable license issued by the New York State Racing and Wagering Board (the "Racing Board"). *See* N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 307(1) (McKinney 1984). Yonkers Raceway is currently the only operating New York harness racetrack in the New York metropolitan area, although the Meadowlands in New Jersey often has harness, as opposed to flat, racing.

2. Aside from Yonkers Raceway, the other harness racetracks in New York are Batavia Downs, Buffalo Raceway, Monticello Raceway, Saratoga Raceway and Vernon Downs. Another harness racetrack, Roosevelt Raceway, closed in 1988.

Prior to YRC's denial of Hadges's application, Hadges's racing career suffered two significant interruptions. First, the Racing Board suspended Hadges's license from 1974 to 1976 because Hadges had not reported his criminal record on his license application. Thereafter, in 1989, the Racing Board once again suspended Hadges's license after determining that Hadges had illegally passed wagering information to a patron at Roosevelt Raceway on a race in which Hadges was participating. Specifically, the Racing Board found that, as Hadges approached the starting gate, he trailed behind the other horses and shouted, "Get the '7'," to someone in the stands. Hadges's horse, the number 2, finished behind the victor—the number 7.

The Racing Board reinstated Hadges's license in July, 1989. Soon thereafter, Hadges applied to YRC for racing and training privileges at Yonkers Raceway. YRC denied the application. Upon Hadges's request, representatives of YRC met with him to explain the denial. YRC's General Manager informed Hadges that YRC did not grant Hadges's application because

of Hadges's involvement in litigation over the ownership of horses, as well as his lack of integrity as evidenced by the incident at Roosevelt Raceway.

Hadges contends that YRC's denial of his application amounted to state action under section 1983 because YRC was subject to pervasive State statutory and regulatory control, and because it generated significant tax revenues for the State, received State tax credits, and held a monopoly over harness racing in the New York metropolitan area. In response, YRC asserts that it rejected Hadges's application pursuant to its statutory right as private owner to exclude persons from its racetrack without reason, provided that the exclusion is not based upon race, creed, or national origin. *See* N.Y.Comp.Codes R. & Regs. tit. 9, § 4119.8 (1985). YRC further contends that its private right exists independently from the Racing Board's power to suspend or revoke licenses. *See* N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 309 (McKinney 1984 & Supp.1990).

DISCUSSION

[1] To maintain a cause of action under 42 U.S.C. § 1983, a plaintiff must establish that he suffered a violation of a constitutional right and that the violation was committed under color of state law. 42 U.S.C. § 1983. Private conduct qualifies as state action when "[t]he State has so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity," *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725, 81 S.Ct. 856, 862, 6 L.Ed.2d 45 (1961), or when "there is a sufficiently close nexus between the State and the challenged action" that the private party's action "may be fairly treated as that of the State itself," *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974).

Appellant argues that YRC's denial of his request to work at Yonkers Raceway qualifies as state action under both the symbiotic relationship test under *Burton*, and the close nexus test set forth in *Jack-*

son. Neither of these tests lends itself to formulaic applications. Instead, both of these inquiries require us to sift through and weigh the facts to determine whether the alleged ties between the State and the private actor are sufficiently strong to attribute the private actor's conduct to the state. *See Burton,* 365 U.S. at 722, 81 S.Ct. at 860. The factual record, specifically YRC's actions within the context of the harness racing industry in the State, necessarily determines the contours and limits of our decision.

A. *Symbiotic Relationship*

[2] In arguing that the State was a joint participant in YRC's enterprise, Hadges takes us on a guided tour of Yonkers Raceway, highlighting instances of the State's allegedly pervasive presence: at the door, State law requires YRC to collect an admission tax, N.Y.Rac. Pari–Mut. Wag. & Breed. Law § 306 (McKinney 1984), and regulates the price of admission, N.Y. Comp.Codes R. & Regs. tit. 9, § 4101.26

(1985); at the betting windows, the Racing Board supervises all gambling activities, N.Y.Rac. Pari–Mut. Wag. & Breed. Law § 305 (McKinney 1984), and the State Tax Commission oversees the financial aspects of gambling, *id.*, §§ 306, 316 (McKinney 1984 & Supp.1990); on the track and in the stands, the State has exclusive power to issue licenses to all track personnel, from vendors to veterinarians, *id.*, § 309; and, at the finish, YRC generates significant tax revenues for the State, and the State awards YRC tax credits.

Armed with these examples of the State's fiscal and regulatory links to YRC, Hadges erroneously allies the instant case with *Burton*. In *Burton*, the owner of a private restaurant that leased space in a state-owned building refused to serve an African–American man. *See Burton*, 365 U.S. at 720, 81 S.Ct. at 859 (1961). The Supreme Court found that the restaurateur's action qualified as state action because the state owned the building, paid the building's maintenance, owned an adjacent parking lot and therefore had a direct

financial interest in the restaurant's success, and dedicated the building for public purposes, thereby conferring tax exempt status on the building. *See id.* at 723–24, 81 S.Ct. at 860–61.

While *Burton* cautions courts to search for "nonobvious involvement of the State in private conduct," *id.* at 722, 81 S.Ct. at 860, we do not believe that appellant's tour of Yonkers Raceway reveals the nature or extent of state involvement that was present in *Burton*. In contrast to *Burton*, the State in the instant case does not have a proprietary interest in Yonkers Raceway. *See id.* at 723, 81 S.Ct. at 860–61; *see also Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175, 92 S.Ct. 1965, 1972, 32 L.Ed.2d 627 (1972) (symbiotic relationship test not satisfied where site of challenged action owned by private party). Yonkers Raceway was purchased and is maintained by private, not public, dollars. The State in the instant case also does not own a neighboring, interlinked business, and consequently lacks as direct a financial stake in YRC's success as was present in *Burton*. *See Burton*, 365 U.S. at 724, 81 S.Ct. at 861.

Similarly, on a fiscal score, while YRC receives tax credits from the State, YRC does not enjoy the State's tax-exempt status. Indeed, much of the revenue that the State gains from YRC is derived from taxes paid by YRC, its patrons, and its workers. To be sure, the State gains greater revenues if YRC prospers. If this link were sufficient to forge a symbiotic relationship between YRC and the State, however, the actions of every successful corporation within the State would qualify as state action. *See Roberts v. Louisiana Downs, Inc.*, 742 F.2d 221, 225 (5th Cir. 1984) (receipt of substantial revenues by state from private actor's business does not create symbiotic relationship between private actor and state).

Lastly, Hadges argues that the State's regulatory control over YRC satisfies the symbiotic relationship test. Subsequent to *Burton*, however, the Supreme Court enunciated the close nexus test as the standard for determining whether state regulatory control qualifies as state action. *See Jackson*, 419 U.S. at 351, 95 S.Ct. at 453–54

(1974). Hadges's regulatory argument is therefore more appropriately analyzed under *Jackson*. *See id.; see also Bier v. Fleming*, 717 F.2d 308 (6th Cir.1983), *cert. denied*, 465 U.S. 1026, 104 S.Ct. 1283, 79 L.Ed.2d 686 (1984); *Fulton v. Hecht*, 545 F.2d 540 (5th Cir.) *cert. denied*, 430 U.S. 984, 97 S.Ct. 1682, 52 L.Ed.2d 379 (1977).

B. *Close Nexus*

[3] While the symbiotic relationship test focuses on the state's overall relationship with the private actor, the close nexus test specifically examines the state's link to the challenged action. *See Jackson*, 419 U.S. at 351, 95 S.Ct. at 453–54. Hadges does not contend that a State official was directly involved in YRC's denial of Hadges's request.[3] Instead, Hadges offers

3. In the Reply Brief and again at oral argument, Hadges stated that, "at this stage of the litigation," he had no evidence that a State official influenced YRC's decision, but suggested that we remand for further discovery on this issue. Under section 1983, however, appellant bears

three other arguments to support his theory. Specifically, Hadges contends that the State's pervasive regulatory control over YRC, the State's alleged delegation, via N.Y.Comp.Codes R. & Regs. tit. 9, § 4119.8 (1985), of its authority to exclude undesirable persons from Yonkers Raceway to YRC, and YRC's sometime monopoly over harness racing in the New York metropolitan area satisfy the close nexus test. We believe that these arguments are untenable because in each instance the State's link to the challenged action is too tenuous to fall within *Jackson*.

the burden of proof on the state action issue. *See Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 155, 98 S.Ct. 1729, 4732–33, 56 L.Ed.2d 185 (1978). As such, to defeat YRC's motion for summary judgment, which was supported by an affidavit from a YRC representative stating that no State official had taken part in YRC's decision, Hadges would have had to "set forth specific facts showing that there [was] a genuine issue for trial." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256–57, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986). Because he did not produce any such facts, remand for further discovery would be inappropriate.

In *Jackson*, Metropolitan Edison ("Metropolitan"), a privately-owned utility, terminated Jackson's electricity because plaintiff's account was in arrears. *See Jackson*, 419 U.S. at 346–47, 95 S.Ct. at 451–52. Plaintiff filed suit pursuant to section 1983 claiming that the termination constituted state action depriving her of property without due process of law. *See id.* at 347–48, 95 S.Ct. at 451–52. Jackson's state action claim rested on the state's extensive regulation of the utility, the monopoly status that the state had allegedly conferred upon Metropolitan, the essential nature of the utility service, and the state's alleged approval of Metropolitan's termination practice. *See id.* at 351–55, 95 S.Ct. at 453–56. The Court found that the state's involvement in Metropolitan's affairs was insufficient to create a "close nexus" between Metropolitan and the state such that "the action of the [utility] may be fairly treated as that of the State itself." *Id.* at 351, 95 S.Ct. at 453.

Jackson specifically refutes appellant's contention that the presence of state regulation alone transmutes a private actor's

conduct into state action. *See id.* at 350, 95 S.Ct. at 453. As mentioned above, there is no evidence that a State official participated in YRC's decision to deny Hadges's application. The district court, therefore, correctly distinguished the instant case from *Fitzgerald v. Mountain Laurel Racing, Inc.*, 607 F.2d 589 (3d Cir.1979), *cert. denied*, 446 U.S. 956, 100 S.Ct. 2927, 64 L.Ed.2d 814 (1980), in which the Third Circuit held that if a State official "personally and actively participated" in a racetrack's decision to expel a driver, state action existed. *Id.* at 599. Although YRC's denial of Hadges's application was based in part on the State's suspension of Hadges's license, YRC did not act at the behest of a State official and was not enforcing a violation of State racing law. Thus, the line between the State, as regulator of the harness racing industry, and YRC, as a private corporation acting in what it believed to be its own best interest as well as the best interest of the harness racing industry, remained distinct. As such, appellant's regulatory argument fails under *Jackson*. *See Jackson*, 419 U.S. at 350, 95 S.Ct. at 453.

Appellant seizes upon *Jackson* dicta regarding delegation by the state of state power to a private actor as the second ground for his close nexus argument. Specifically, appellant attaches weight to the comment that, "[i]f we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty ... our case would be quite a different one." *Id.* at 352–53, 95 S.Ct. at 454. Hadges argues that, via N.Y.Comp.Codes R. & Regs. tit. 9, § 4119.8 (1985), the State delegated to YRC its authority to exclude undesirable persons from Yonkers Raceway.

While declaring that the power to exclude a person for no reason from a privately owned racetrack is "clearly a power 'traditionally associated with sovereignity,'" however, appellant produces no evidence to support this conclusory statement. Indeed, section 4119.8, providing that the private owner of a harness racetrack may

exclude any person without reason, provided that the exclusion is not based on race, creed, color or national origin, N.Y.Comp. Codes R. & Regs. tit. 9, § 4119.8 (1985), simply codifies the racetrack owner's common law right to exclude undesirable persons from the track. *See, e.g., Madden v. Queens County Jockey Club, Inc.*, 296 N.Y. 249, 72 N.E.2d 697, *cert. denied*, 332 U.S. 761, 68 S.Ct. 63, 92 L.Ed. 346 (1947); *People v. Licata*, 28 N.Y.2d 113, 320 N.Y. S.2d 53, 268 N.E.2d 787 (1971). Moreover, this private right is different in kind, nature, and origin from the State Racing Board's power to enforce State racing law through license suspensions. N.Y.Rac. Pari-Mut. Wag. & Breed. Law § 309 (McKinney 1984 & Supp.1990). Appellant's delegation argument thus unsuccessfully attempts to transform a private proprietary right into a State regulatory power.

Finally, appellant's last argument—that YRC's alleged monopoly status in the New York metropolitan area satisfies the close nexus test—also lacks merit. As a prelimi-

nary matter, we question whether Hadges has produced sufficient evidence to support his allegation that YRC has a monopoly over harness racing in the New York metropolitan area. Leaving aside the Meadowlands operation, there is no indication that the State ever "granted or guaranteed" YRC such a monopoly. *Jackson*, 419 U.S. at 351 & n. 8, 95 S.Ct. at 454 & n. 8.[4] While State law limits the number of harness racing licenses that the Racing Board can issue to eight per year, N.Y.Rac. Pari-Mut. Wag. & Breed. Law § 305 (McKinney 1984), the minimal impact of this limit does not confer a monopoly on YRC. *See Moose Lodge No. 107*, 407 U.S. at 177, 92 S.Ct. at 1973. The existence of the alleged monopoly is therefore dubious at best, and it will be remembered that for many years Yonk-

4. In fact, in the past, the State has licensed entities apart from YRC to conduct harness racing in the New York metropolitan area. Prior to 1988, Roosevelt Raceway conducted harness racing in Long Island. Appellant can point to no evidence that the State would not license the owner of Roosevelt, or any other racing concerns, to conduct harness racing in the greater New York City area.

ers Raceway and Roosevelt Raceway operated in tandem.

Even assuming, however, that Hadges has established that YRC holds such a monopoly, this case still would not satisfy the close nexus test. Under *Jackson*, Hadges must establish a relationship between YRC's actions and its monopoly status. *See Jackson*, 419 U.S. at 351–52, 95 S.Ct. at 453–54. While Hadges claims that, because of YRC's monopoly status, its denial of his request effectively revoked his license to work at harness racetracks in the State, Hadges offers us no credible evidence supporting such a *de facto* revocation.[5] Likewise, he produces no evidence of any other link between YRC's denial of his request and its alleged monopoly. Hadges's recipe for a case that meets the close nexus test therefore lacks a basic ingredient—a nexus. *See id.* at 351, 95 S.Ct. at 453–54.

Accordingly, we affirm the judgment of the district court.

5. Indeed, the record lends no support to Hadges's contention. The State has licensed six harness racing tracks within its jurisdiction. While Yonkers Raceway may be the most convenient racetrack for appellant, the remaining five are also accessible. Inconvenience is not the stuff from which *de facto* revocation is made.

Appendix B — Civil Judgment, United States District Court for the Southern District of New York Entered March 20, 1990

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEORGE HADGES,
Plaintiff,

-against-

YONKERS RACING CORPORATION,
Defendant.

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89 **CIVIL** 8055(GLG)
JUDGMENT

U.S. DISTRICT COURT
FILED
MAR 20 1990
S.D. OF N.Y.

Whereas the above entitled action having been assigned to the Honorable Gerard L. Goettel, U.S.D.J., and the Court thereafter on March 20, 1990, having handed down its opinion granting the defendant's motion for summary judgment and denying plaintiff's motion for a preliminary injunction, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed and plaintiff's motion for a preliminary injunction is denied.

Dated: White Plains, New York /s/*Raymond F. Burghardt*
March 20, 1990 Clerk

Appendix C — Opinion and Order of the United States District Court for the Southern District of New York dated March 19, 1990

George HADGES, Plaintiff,

v.

YONKERS RACING CORPORATION, Defendant.

No. 89 Civ. 8055 (GLG).

United States District Court,
S.D. New York.

March 19, 1990.

Driver, trainer and owner of horses brought civil rights action against racetrack which had excluded him. On track owner's motion for summary judgment, the District Court, Goettel, J., held that owner's exclusion of trainer from track did not constitute state action, and thus did not give rise to § 1983 liability.

Motion granted.

1. Federal Civil Procedure ⇐2533

If, in resolving motion to dismiss for failure to state cause of action, court considers matters outside pleading, motion shall be treated as one for summary judgment. Fed.Rules Civ.Proc.Rules 12(b)(6), 56, 28 U.S.C.A.

2. Civil Rights ⇐198(6)

Racetrack owner's exclusion of licensed driver, trainer and horse owner from track did not constitute state action, and thus did not give rise to § 1983 liability; though track was heavily regulated and licensed by state, track's exercise of its retained common-law right to exclude certain persons was based on its own business judgment without involvement of state officials. 42 U.S.C.A. § 1983.

3. Civil Rights ⇐198(6)

Racetrack owner's exclusion of licensed driver, trainer and horse owner from track did not involve "state action," and thus did not give rise to § 1983 liability; though track was heavily regulated and

licensed by state, it was privately owned facility, operated for profit of its shareholders. 42 U.S.C.A. § 1983.

Goodkind, Labaton & Rudoff, New York City (Mark S. Arisohn, of counsel), for plaintiff.

Bleakley Platt & Schmidt, White Plains, N.Y. (Frederick J. Martin and William P. Harrington, of counsel), for defendant.

OPINION

GOETTEL, District Judge:

George Hadges, a driver, trainer, and owner of standardbred horses,[1] has sued Yonkers Racing Corporation ("YRC"), the owner and operator of Yonkers Raceway ("Yonkers") in Yonkers, New York, under 42 U.S.C. § 1983 (1982) for alleged viola-

1. Standardbred horses are raced at harness tracks where the driver rides behind the horse in a sulky. This is to be distinguished from thoroughbred horses that race with riders on their backs.

tions of his Fourteenth Amendment due process rights. Specifically, he contends that YRC's refusal to allow him to utilize his state-issued licenses at Yonkers without affording him sufficient procedural protections was a violation of his rights. Plaintiff now moves for a preliminary injunction and YRC cross-moves to dismiss or, in the alternative, for summary judgment.

I. FACTS

Plaintiff is licensed as a driver, trainer, and owner in numerous states, including Delaware, Florida, Maryland, New Jersey, Ohio, and Pennsylvania. His primary work, however, has been in New York, where he is also licensed. New York law, like that of most states, requires such licensing before one can work at any of the tracks in the state. N.Y.Comp.Codes R. & Regs. tit. 9, § 4101.24(b) (1985) (promulgated pursuant to N.Y. Rac. Pari–Mut. Wag. & Breed. Law § 309 (McKinney 1984 & Supp.1990)). Within New York, plaintiff has worked most of the state's harness

tracks,[2] but has worked most frequently at Yonkers. He has worked at Yonkers in one capacity or another since 1972, with two significant interruptions.

First, plaintiff's New York license was suspended by the New York State Racing and Wagering Board ("NYSWRB")[3] from

2. Besides Yonkers Raceway, the other principal New York harness tracks are Batavia Downs, Buffalo Raceway, Monticello Raceway, Saratoga Raceway, and Vernon Downs. Apparently, there are also harness tracks in Goshen and Syracuse that operate on a limited basis. Another track, Roosevelt Raceway, was located on Long Island but closed in 1988. Plaintiff had also raced there and, in fact, some of his present difficulties stem from events occurring at Roosevelt.

3. The New York State Racing and Wagering Board has jurisdiction over all horse racing activities in New York. N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 101 (McKinney 1984). Included within the NYSRWB's powers are the abilities to issue, suspend, or revoke licenses. *Id.* § 309 (McKinney 1984 & Supp.1990).

1974 to 1976 because of certain omissions on his initial application for a license. Specifically, he had neglected to report four criminal arrests on his application. Plaintiff could not compete at any of the harness tracks in New York during the period of suspension. More germane to the present action, however, is plaintiff's recent suspension by the NYSRWB. Plaintiff's license was suspended from January 5, 1989 to July 5, 1989 due to events occurring at Roosevelt Raceway on October 9, 1986. The NYSRWB determined that plaintiff had illegally signaled a patron of the racetrack to bet on a horse other than the one plaintiff was riding. Thereafter, the NYSRWB reinstated plaintiff's license effective July 5, 1989. Plaintiff's request for reinstatement of his privileges at Yonkers, however, was denied by YRC. Moreover, in the Fall of 1989 YRC further ex-

cluded plaintiff from even entering the grounds at Yonkers as a patron.[4]

YRC contends that it banned plaintiff pursuant to its common law rights, which the NYSRWB has expressly protected, to exclude anyone "without reason, provided such exclusion is not based upon race, creed, color or national origin." N.Y. Comp.Codes R. & Regs. tit. 9, § 4119.8

4. The timing of this subsequent ban as a patron is hotly disputed. Plaintiff contends it occurred on November 17, 1989 while Yonkers claims the ban became effective in October 1989. We find no need to resolve this dispute. We do recognize, however, that part of plaintiff's grievance is that he was banned from Yonkers because of testimony he gave before this court on November 1, 1989 on behalf of another driver in an unrelated matter. Obviously, this argument is specious with respect to his being banned as an owner, driver, and trainer since plaintiff himself admits that he was banned for these purposes sometime prior to November 1. As to his being banned as a patron, however, this argument is not specious if plaintiff actually was banned on November 17. Nonetheless, it is extremely doubtful that plaintiff has any cognizable rights in being a patron at Yonkers. *See Ziskis v. Kowalski*, 726 F.Supp. 902, 904 (D.Conn.1989). More importantly, our finding that YRC's action was not state action, *see infra*, renders this entire issue moot.

(1985). Notwithstanding the NYSRWB's ability to suspend or revoke licenses, YRC claims that as a private racetrack owner, it retains the ability to exclude participants and patrons. More specifically, YRC states that it banned plaintiff because of his past racing performances and his involvement in litigation over the ownership of horses. Galterio Aff. at 3. Additionally, YRC points out that plaintiff's record as a driver and trainer was marginal, at best, and that it is continually seeking to offer the highest quality competition to its patrons.[5]

In December 1989, not having been able to convince YRC to reinstate his privileges, plaintiff instituted this action and moved

5. The exact chain of events that transpired with respect to the ban is disputed. It is unclear whether plaintiff was ever offered any explanation for the ban or if he was allowed to rebut YRC's contentions. Ordinarily, we would have to resolve this issue in order to determine whether plaintiff was afforded appropriate due process protections. However, since we find no state action, *see infra,* we need not resolve this issue.

for a preliminary injunction.[6] YRC, in turn, cross-moved to dismiss or, alternatively, for summary judgment. Since we find one issue to be dispositive of both motions, we will consider them simultaneously.

II. DISCUSSION

[1] The standard for granting a motion for a preliminary injunction is well established. The plaintiff must show:

> irreparable harm and either (1) probable success on the merits or (2) sufficiently serious questions going to the merits to

6. Plaintiff had previously brought an action on March 24, 1989 pursuant to 42 U.S.C. § 1983 against Richard Corbisiero, chairman of the NYSRWB, claiming that his 1989 license suspension violated his due process rights and was based on a regulation that was unconstitutionally vague. This action is presently pending before us, although we note that plaintiff's motion for a preliminary injunction was denied. *Hadges v. Corbisiero,* No. 89 Civ. 2012, slip op. (S.D. N.Y. Apr. 20, 1989), *reargument denied,* No. 89 Civ. 2012, slip op. (S.D.N.Y. May 16, 1989). Plaintiff contends that his filing of this action against Corbisiero was one of the factors behind YRC's decision to exclude him from Yonkers.

> make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor.

Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 206–07 (2d Cir.1979). Thus, even if we assume irreparable harm and a balance of hardships in plaintiff's favor, plaintiff must at least show the existence of "sufficiently serious questions going to the merits." The standard governing a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is equally well settled. Such a motion can only be granted if "it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). However, rule 12(b) further states that if in resolving a motion under rule 12(b)(6) the court considers matters outside the pleading, the motion shall be treated as one for summary judgment. In this case, we have considered affidavits submitted by both parties and, therefore, treat YRC's motion as one for summary judgment under rule 56. Rule 56 states that summary judgment

shall be granted if the moving party can "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). If the moving party satisfies this burden, the party opposing the motion "must set forth specific facts showing that there is a genuine need for trial," Fed.R.Civ.P. 56(e), and there must be more than merely "some metaphysical doubt as to [these] material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). While motions for a preliminary injunction and for summary judgment obviously rest on different grounds, it stands to reason that if we conclude that YRC's summary judgment motion can be granted because there are no genuine issues of material fact and it is entitled to judgment as a matter of law, *a fortiori*, there are no serious questions going to the merits and plaintiff's motion for a preliminary injunction must be denied.

Plaintiff has sued under 42 U.S.C. § 1983, which provides a remedy for deprivations of rights secured by the Constitu-

tion when such deprivation takes place "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory...." 42 U.S.C. § 1983 (1982). Plaintiff claims that his Fourteenth Amendment right to freedom from deprivations of "life, liberty, or property, without due process of law" has been violated. Specifically, the Fourteenth Amendment is limited to deprivations caused by the "state" and without this so-called "state action," there is no Fourteenth Amendment violation. Since section 1983 was meant to provide a remedy for Constitutional violations, a finding of "state action" for Fourteenth Amendment purposes also satisfies the "under color of" requirement of section 1983. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 934–35, 102 S.Ct. 2744, 2752, 73 L.Ed.2d 482 (1982).[7] Therefore, for

7. The *Lugar* Court recognized that the requirements of state action under the Fourteenth Amendment and action "under color of any statute ... of any State" under section 1983 may not be identical. Nonetheless, the Court stated that "[i]f the challenged conduct of respondents constitutes state action as delimited by our prior decisions, then that conduct was also action

there to be a genuine issue of material fact and, in turn, a serious question going to the merits, we must conclude that YRC's actions can be considered state actions.

YRC moves for summary judgment claiming there is no issue of material fact on the question of state action. YRC argues that it is a private, closely held corporation operating for the profits of its shareholders. Moreover, it contends that since acquiring the track in 1970, the Rooney family, who are the corporation's shareholders, have invested $65,000,000.00 in the track. YRC also claims that while it is heavily regulated and operates the track pursuant to a license granted by the state, these factors do not transpose its private decisions into state action, especially since

under color of state law and will support a suit under § 1983." *Lugar,* 457 U.S. at 935, 102 S.Ct. at 2752; *see Annunziato v. The Gan, Inc.,* 744 F.2d 244, 249-50 (2d Cir.1984).

the NYSRWB has reserved YRC's common law right to exclude anyone from the track except if based on race, creed, color, or national origin. N.Y.Comp.Codes R. & Regs. tit. 9, § 4119.8 (1985); *see Saumell v. New York Racing Ass'n*, 58 N.Y.2d 231, 238, 460 N.Y.S.2d 763, 766–67, 447 N.E.2d 706, 708 (1983); *Jacobson v. New York Racing Ass'n*, 33 N.Y.2d 144, 149, 350 N.Y. S.2d 639, 642, 305 N.E.2d 765, 767–68 (1973). Finally, YRC offers an affidavit from the general manager at Yonkers stating that no state officials were involved in the decision to deny privileges to plaintiff.

Plaintiff counters these arguments by stating that racing at Yonkers is highly regulated by the state and that the state receives substantial revenues from the tracks. Moreover, plaintiff suggests that the state has afforded YRC a monopoly in the metropolitan New York City region, especially now that Roosevelt Raceway on Long Island has closed. Plaintiff contends that the other tracks in the state are not viable alternatives because of their location and their small purses and, therefore, that a denial of privileges at Yonkers is a de facto revocation of his license. With these

arguments before us, we can now address this issue. We note that we are apparently the first federal court in this state to squarely address this truly vexatious question.[8]

8. We, like Judges Pierce, Sweet, and Weinfeld before us, have been able to resolve cases presenting analogous factual situations without deciding this question of state action. *See Daigneault v. Yonkers Racing Corp.*, 735 F.Supp. 62, 63 (S.D.N.Y.1989) (Goettel, J.) (not necessary to resolve issue); *Rahner v. Yonkers Racing Corp.*, No. 78 Civ. 3967, transcript at 33 (S.D.N.Y. Sept. 11, 1978) (Pierce, J.) (assuming state action); *Rahner v. Yonkers Racing Corp.*, No. 78 Civ. 3967, slip op. at 1 (S.D.N.Y. Aug. 24, 1978) (Sweet, J.) (assuming state action); *Daigneault v. Yonkers Racing Corp.*, No. 76 Civ. 3999, slip op. at 6 (S.D.N.Y. Oct. 13, 1976) (Goettel, J.) (not necessary to resolve issue); *Gilmour v. New York State Racing & Wagering Bd.*, 405 F.Supp. 458, 460 (S.D.N.Y.1975) (Weinfeld, J.) (assuming state action). The New York Court of Appeals has never decided this question either and the only appellate decision in New York was rendered by the Appellate Division, Third Department, in *Arone v. Sullivan County Harness Racing Ass'n*, 90 A.D.2d 137, 457 N.Y.S.2d 958 (3d Dep't 1982). The *Arone* court concluded that there was no state action based on the facts it was presented with. *Id.*, 457 N.Y.S.2d at 959. This case will be discussed further in a subsequent section of this opinion.

The Supreme Court has announced two different tests for determining whether state action exists. Specifically, there must be a showing that:

> "there is a sufficiently close nexus between the [government] and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the [government] itself," *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974) (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176, 92 S.Ct. 1965, 1973, 32 L.Ed.2d 627 (1972)), or that even if the particular act is not directly attributable to the government, the government "so far insinuated itself into a position of interdependence with [the entity] that it was a joint participant in the enterprise." *Jackson*, 419 U.S. at 357–58, 95 S.Ct. at 457 (citing *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725, 81 S.Ct. 856, 861–62, 6 L.Ed.2d 45 (1961)).

Myron v. Consolidated Rail Corp., 752 F.2d 50, 54 (2d Cir.1985). While these tests provide some guidance on resolving this

question, the Court itself has recognized that any resolution of the issue requires a fact specific inquiry. *Lugar*, 457 U.S. at 939, 102 S.Ct. at 2754–55. The bottom line is that there must be a showing that the activities of the ostensibly private entity are fairly attributable to the state. *Rendell–Baker v. Kohn*, 457 U.S. 830, 838, 102 S.Ct. 2764, 2769–70, 73 L.Ed.2d 418 (1982). In the case at bar, it is unclear which of these two tests plaintiff is relying on. Nonetheless, we find that under either test, plaintiff has not shown the existence of state action.

A. *Close Nexus*

[2] The principal case credited with establishing the "close nexus" test is *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974). In *Jackson*, plaintiff's electricity service was terminated by Metropolitan Edison, a privately owned utility, because of non-payment of bills. Plaintiff brought suit under section 1983 claiming she was entitled to notice and a hearing before her services could be terminated. Plaintiff claimed that the pervasive regulation of the utility, the

virtual monopoly granted to the utility by the state in the relevant geographic area, and the essential nature of the service being provided created state action. Moreover, plaintiff contended that since the utility's tariff, which was filed with the state, permitted the utility to cancel a customer's account upon non-payment, state action existed when such a termination was effectuated. Notwithstanding these arguments, the Court found these factors insufficient to establish a "close nexus" between the utility and the state such that "the action of the [utility] may be fairly treated as that of the State itself." *Id.* at 351, 95 S.Ct. at 453. The utility was privately owned and, irrespective of heavy regulation and a state-granted virtual monopoly, there was no state action.

We are persuaded by the analysis of the *Jackson* Court although we certainly recognize that the plaintiff in *Jackson* did not possess a state-issued license as in the case before us. First, plaintiff contends that both Yonkers and YRC are heavily regulated by the state, even to a greater extent than that evident in *Jackson.* Admittedly, there exists pervasive regulation by the

state of virtually every aspect of the harness racing business. In fact, without state approval, YRC could not operate a harness track in the state. N.Y. Rac. Pari.-Mut. Wag. & Breed. Law § 307 (1984); N.Y.Comp.Codes R. & Regs. tit. 9, § 4101.1 (1985). Nonetheless, the *Jackson* Court emphatically stated that regulation alone, even if "extensive and detailed," will not satisfy the close nexus test. *Jackson*, 419 U.S. at 350, 95 S.Ct. at 453; *see also Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 938, 102 S.Ct. 2744, 2754, 73 L.Ed.2d 482 (1982) (government regulation must be connected to the private entity's decision). Moreover, mere licensing by the state of YRC is not sufficient to establish state action. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171–72, 92 S.Ct. 1965, 1970–71, 32 L.Ed.2d 627 (1972). Plaintiff further contends that the monopoly power granted to YRC in the metropolitan area, especially since Roosevelt Raceway has now closed, is further evidence of the requisite close nexus between the state and YRC's decision. Once again, however, the *Jackson* Court resolved this issue, stating that plaintiff must show a relationship between the defendant's actions and its monopoly status.

Jackson, 419 U.S. at 352, 95 S.Ct. at 454. No such showing has been made since plaintiff can still work at any other track in New York.[9] There has been no suggestion that a ban from Yonkers amounts to a ban from the other tracks.[10]

The mere fact that the state allows YRC to continue to exercise its common law rights is not state action, absent some state involvement in YRC's denial of privileges to plaintiff. *See Jackson*, 419 U.S. at 357, 95 S.Ct. at 456–57. There was no exercise by YRC of a power "traditionally exclusive-

9. We note that Meadowlands Raceway, located in New Jersey and within the metropolitan New York City region, remains an alternate track where plaintiff can work.

10. We admit that proof that other tracks in the state followed YRC's decision could establish state action since YRC's decision, in effect, would result in the de facto revocation of plaintiff's license. In fact, one of the principal reasons behind the conclusion that decisions by the New York Racing Association ("NYRA") are state action is the fact that NYRA, a not-for-profit association operating New York's thoroughbred tracks, can preclude parties from working at virtually all of New York's thoroughbred tracks. *See infra.*

ly reserved to the State." *Id.* at 352, 95 S.Ct. at 454. Instead, the evidence presented shows that YRC's decision to exclude plaintiff was based on its own business judgment. *See Gilmour v. New York State Racing & Wagering Bd.*, 405 F.Supp. 458, 460 (S.D.N.Y.1975) ("The owners of the raceways, no less than the state and its official agency, ... have a great stake in maintaining and protecting the sport's integrity against those who would despoil it."). While we recognize that state officials are present at each race conducted at Yonkers and that these officials can conduct inquiries into the performances of drivers and trainers, there has been no suggestion that these state officials were involved in YRC's decision to exclude plaintiff.[11] Moreover, the fact that YRC's decision, may, at least in part, have been based on the same factual predicates that previously resulted in disciplinary actions by the

11. Admittedly, a situation can arise wherein the state officials instigate the private action by initiating an inquiry and then refusing to prosecute, leaving the private entity to complete the investigation unbridled by the strictures of the due process clause. There is no suggestion that such chicanery occurred in the case at bar.

state does not turn YRC's actions into state action. It would be unacceptable if any state action, like an arrest, could not be relied on by a private entity in making a decision to grant or deny certain privileges because such reliance would make the denial of privileges a state decision. The state must be "responsible" for the defendant's conduct and this did not occur. *See Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 2785–86, 73 L.Ed.2d 534 (1982).

Therefore, we find that plaintiff has not shown state action under the close nexus test.

B. *Symbiotic Relationship*

[3] The second test to be applied in determining the existence of state action is the so-called "symbiotic relationship" test. This test, announced in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961), provides that there will be state action if "[t]he State has so far insinuated itself into a position of interdependence with [the entity] that it must be recognized as a joint participant in the challenged activity." *Id.* at 725, 81 S.Ct. at 861–62. Unlike the close

nexus test, the state need not be involved in the particular decision or action, but rather, the overall relationship between the state and the ostensibly private entity is reviewed. *Myron v. Consolidated Rail Corp.*, 752 F.2d 50, 54 (2d Cir.1985); *Stevens v. New York Racing Ass'n*, 665 F.Supp. 164, 171 (E.D.N.Y.1987). In *Burton*, a private restaurant located in a state-owned building refused to serve plaintiff, a black. The Court agreed there was state action since the restaurant was a lessee of the Wilmington Parking Authority, a state agency that owned the building. Moreover, the responsibility for the upkeep and maintenance of the building rested with the state. Finally, the Court was influenced by the apparent incongruity of a state-operated building being open to the entire public if used for parking, but limited to certain races when the same building, albeit a different part, is used for dining. *Burton*, 365 U.S. at 724–25, 81 S.Ct. at 861–62.

Plaintiff argues that application of the *Burton* analysis to the facts before us requires a similar finding of state action. Again, we disagree. In *Burton*, the restaurant was an actual lessee in a building

owned by the state and paid for with public funds. The case at bar presents no such facts. Yonkers is a privately-owned facility, operated for the profit of YRC's shareholders. While we recognize the existence of a license agreement issued by the state to YRC, as well as substantial regulation by the state, this nowhere approximates the level of interdependence seen in *Burton* where the state actually owned the building. The *Jackson* Court, in fact, similarly refused to accept the *Burton* Court's analysis, concluding that the private owner, though heavily regulated, was not a joint venturer with the state. *Jackson*, 419 U.S. at 358, 95 S.Ct. at 457. Moreover, in the case before us there is no suggestion of the incongruity that troubled the Supreme Court in *Burton*. Finally, the fact that the state receives significant revenues from the track and that these revenues increase if the track is prosperous does not create a symbiotic relationship. *See Roberts v. Louisiana Downs, Inc.*, 742 F.2d 221, 225 (5th Cir.1984). It cannot be said that "the State in any realistic sense [is] a partner or even a joint venturer in [YRC's] enterprise." *Moose Lodge No. 107 v. Irvis*, 407

U.S. 163, 176–77, 92 S.Ct. 1965, 1973, 32 L.Ed.2d 627 (1972); *see also Lemberos v. Laurel Racecourse, Inc.*, 489 F.Supp. 1376, 1383 (D.Md.1980) (similarly distinguishing *Burton* because private funds used to acquire track and profits went to private shareholders).

Therefore, we conclude that there has been no showing of state action under the symbiotic relationship test either.

C. *Other Authorities*

The New York Court of Appeals, as we have noted, has never ruled on this issue. The highest court in the state that has considered this question concluded that there was no state action. *Arone v. Sullivan County Harness Racing Ass'n*, 90 A.D.2d 137, 457 N.Y.S.2d 958, 959 (3d Dep't 1982). Although we are certainly not bound by this decision, we are persuaded by the court's analysis. In *Arone*, the plaintiffs were excluded from Monticello Raceway and claimed the exclusion was state action. The Appellate Division, Third Department, disagreed, relying on the fact that the defendant, as in the instant action, was a private corporation operating for the

profits of its shareholders. Moreover, the court found that the association did not have monopoly power since plaintiffs could work at any of the state's other harness tracks. Notwithstanding heavy regulation of the industry, the court held, the NYSRWB allowed the track's proprietors to retain their common law power to exclude undesirable persons. Finally, the court noted, there were no state officials involved in the defendant's specific decision to exclude the plaintiffs. *Id.* 457 N.Y.S.2d at 959.

The *Arone* court rejected an argument, similar to one seemingly raised by plaintiff in the case at bar, that it should ignore distinctions between New York's harness and thoroughbred tracks. As noted, harness tracks are operated by private organizations with the approval of the NYSRWB. Moreover, the NYSRWB heavily regulates the activities at these tracks. On the other hand, the state's major thoroughbred tracks are owned and operated by the New York Racing Association ("NYRA"), a not-for-profit racing association, pursuant to a twenty-five year license issued by the NYSRWB. Any prof-

its earned through such racing inure to the benefit of the state. Finally, NYRA has a virtual monopoly in New York's thoroughbred tracks since it operates three of the four tracks in New York and the one it does not operate, Finger Lakes Racetrack in Canadaigua, New York, offers substantially lesser purses than do the other tracks. Therefore, a licensed driver or trainer effectively can be barred from plying his trade in New York if NYRA decides not to grant him privileges. *See Jacobson v. New York Racing Ass'n*, 33 N.Y.2d 144, 149–50, 350 N.Y.S.2d 639, 642, 305 N.E.2d 765, 767–68 (1973). All these factors lead to the inexorable conclusion that a decision by NYRA is state action. *See Stevens v. New York Racing Ass'n*, 665 F.Supp. 164, 172 (E.D.N.Y.1987) (state action under symbiotic relationship test); *Saumell v. New York Racing Ass'n*, 58 N.Y.2d 231, 240, 460 N.Y.S.2d 763, 768, 447 N.E.2d 706, 710–11 (1983) (state action conceded by NYRA). *See generally Halpern v. Lomenzo*, 81 Misc.2d 467, 367 N.Y.S.2d 653, 656–60 (N.Y.Sup.Ct.1975) (discussion of NYRA). As the *Arone* court concluded, however, there are sufficient distinctions between NYRA's ownership and operation

of thoroughbred tracks and a private corporation's ownership of a harness track. We agree that these distinctions constitute the difference between state action on the one hand, and private action on the other.

In finding an absence of state action, we are not persuaded by the cases plaintiff has cited in support of his argument. In *Fitzgerald v. Mountain Laurel Racing, Inc.*, 607 F.2d 589 (3d Cir.1979), *cert. denied*, 446 U.S. 956, 100 S.Ct. 2927, 64 L.Ed.2d 814 (1980), one of the primary cases plaintiff relies on, a licensed harness driver and trainer was denied stall space by Mountain Laurel Racing, Inc., a private for-profit corporation that operated the Meadows Race Track in Pennsylvania. The decision was based upon a determination that the plaintiff had been driving inconsistently, a violation of state regulations. The court first held that there was no state action under the symbiotic relationship test. Although the defendant was highly regulated, much like YRC, the court found this insufficient to make "the State a joint venturer with Mountain Laurel." *Id.* at 596. The court went on, however, to discuss the close nexus test, concluding that state action exist-

ed. Specifically, the court determined that while a private corporation does maintain its common law right to exclude undesirable persons, in this case the corporation only reached its decision to exclude plaintiff following a meeting with state officials who had witnessed the race in question and confirmed that plaintiff was driving inconsistently. State officials participated in the decision to exclude Fitzgerald, thereby putting the weight of the state behind the decision. *Id.* at 599.

As we have previously noted, determining the presence or absence of state action in a particular situation is a fact specific inquiry. We find the facts of *Fitzgerald* to be entirely distinguishable from those presented before us. In the case at bar, YRC, and YRC alone, made the decision to exclude plaintiff. Plaintiff has offered no evidence suggesting that anyone at YRC consulted the state racing officials before reaching its decision. Moreover, YRC, unlike the corporation in *Fitzgerald*, did not decide to exclude plaintiff by relying on a provision of state law that the NYSRWB is charged with enforcing. *Cf. Sims v. Jefferson Downs Racing Ass'n*, 778 F.2d

1068, 1077 (5th Cir.1985) (similarly distinguishing *Fitzgerald*). Thus, we are not persuaded by *Fitzgerald.* Based on the facts presented before us, YRC's actions cannot be considered state action for purposes of the Fourteenth Amendment and section 1983. *See Bier v. Fleming,* 717 F.2d 308, 310–12 (6th Cir.1983), *cert. denied,* 465 U.S. 1026, 104 S.Ct. 1283, 79 L.Ed.2d 686 (1984).

III. CONCLUSION

YRC has established that its denial of privileges to plaintiff was based strictly on its own business judgment with no state involvement. Moreover, YRC has also shown that no symbiotic relationship exists between YRC and the state. Therefore, plaintiff having failed to offer anything to rebut the conclusion that there was no state action involved in YRC's decision to deny privileges to plaintiff, we must grant summary judgment to the defendant. In turn, we deny plaintiff's motion for a preliminary injunction.

SO ORDERED.

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No. 90-1301

In The

Supreme Court of the United States

October Term, 1990

GEORGE HADGES,

Petitioner,

v.

YONKERS RACING CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did Yonkers Racing Corporation, as the private owner of a harness racetrack licensed by New York State to conduct pari-mutuel wagering on harness racing, engage in state action for the purposes of 42 U.S.C. §1983 when it excluded petitioner from its racetrack?

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No. 90-1301

In The

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GEORGE HADGES,

Petitioner,

v.

YONKERS RACING CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

CONSTITUTIONAL AND STATUTORY PROVISIONS

New York Comp. Codes Rules and Regulations, Title 9, §4119.8 (1985):

> **4119.8 Undesirable persons.** Any person whether a licensee, participant or patron whose conduct is deemed detrimental to the best interest of harness racing or who is deemed an undesirable person may be expelled from the track. In this regard the track, on its own initiative, or upon request of the commission or its representatives, shall take immediate steps by whatever means are reasonably required to expel such

person. Acts deemed undesirable shall consist of, but not be limited by, the following:

(a) bookmaking or other illegal wagering or gambling;

(b) touting;

(c) creating or continuing a public disturbance;

(d) disorderly conduct;

(e) associating with undesirables;

(f) transmitting information to points outside the track;

(g) failure to appear when directed to do so by any official of the commission in furtherance of an investigation or hearing and to testify under oath concerning any facts within his knowledge and produce any books, records, written matter or other evidence within his possession or control relevant to such matter.

In addition a person who has been convicted of a crime involving moral turpitude, or who has been convicted of bookmaking or other form of illegal gambling, or who has been adjudged by any court, State commission, or other governing body guilty of any fraud in connection with racing, or any athletic contest shall be deemed an undesirable person and shall be subject to expulsion as provided in this section. Nothing contained in this section shall diminish the right of any track to exclude any person as a patron or otherwise without reason provided such exclusion is not based upon race, creed, color or national origin.

New York Comp. Code Rules and Regulations, Title 9, §4119.9 (1985):

> **Prohibited acts.** (a) No licensee of the New York State Harness Racing Commission or any other person shall commit any act or conspire to commit any act, which, though not specified in this Subchapter, constitutes conduct detrimental to the best interest of racing or is in its nature fraudulent or corrupt or injurious to the character of the turf. Any such act or attempt, or conspiracy shall constitute a violation of this Subchapter and shall subject the licensee or such other persons to the penalties prescribed herein.

STATEMENT OF THE CASE

Respondent Yonkers Racing Corporation ("YRC"), a closely held private corporation, owns and operates Yonkers Raceway located in Yonkers, New York. Yonkers Raceway is one of six privately owned and operated harness racetracks licensed to conduct pari-mutuel wagering on harness racing in the State of New York.[1] Since purchasing Yonkers Raceway in 1970, YRC has invested $65,000,000 in the racetrack.

Petitioner is a journeyman harness racehorse owner, trainer and driver of marginal ability who participated in harness racing at Yonkers Raceway from time to time

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[1] The New York State Racing and Wagering Board ("Racing Board") has jurisdiction over all horse racing activities in New York. N.Y. Rac. Pari-Mut. Wag. & Breed. Law §101 (McKinney 1984). Included within the Racing Board's powers is the ability to issue licenses to harness racetracks. *Id.* §307 (McKinney 1984 & Supp. 1990). The state license is for a one year term renewable annually. The other licensed harness racetracks in New York are Batavia Downs, Buffalo Raceway, Monticello Raceway, Saratoga Raceway and Vernon Downs.

between 1975 and January 5, 1989. He is one of hundreds of individuals who holds licenses from the state Racing Board to own, train and drive harness racehorses in New York State.[2]

Petitioner's license was suspended by the Racing Board on two separate occasions as a result of serious violations of applicable state racing regulations. First, in 1974 petitioner's original license was suspended and thereafter revoked based upon his fraudulent failure to disclose his prior criminal record on his original license application. Petitioner's initial application for reinstatement of his license was denied in 1975 but ultimately granted and restored in 1976.

Thereafter, based upon a racing incident on October 9, 1986, petitioner's license was again suspended for a period of six months (January 5 to July 5, 1989) for illegally passing wagering information concerning a race in which he was driving to a member of the public in violation of applicable state regulations.[3]

Specifically, after a hearing the Racing Board found that on October 9, 1986, immediately prior to the eighth race at Roosevelt Raceway, while driving the harness racehorse *DAZZLING G.T.*, petitioner signalled and passed wagering information to an individual standing alone

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[2] A harness race, as distinguished from a thoroughbred horse race, is a trotting or pacing race usually run at a distance of one mile. The horses are standardbred horses harnessed to sulkies, which are light, two wheeled carriages. A "driver" sits upon and directs the racehorse from the sulky.

[3] See Rule 4119.9(a) of the Administrative Rules of the Racing Board set forth at length, *supra*.

at the rail.[4] Petitioner was driving the number 2 horse in the race. As petitioner approached the starting gate to begin the race, he trailed far behind the other seven horses in the field and was overheard to call out to a patron standing alone near the rail to "get the 7", a signal to bet on the number 7 horse although petitioner was driving the number 2 horse. The number 7 horse ultimately won the race, as predicted by petitioner, while petitioner's own horse raced erratically, finishing out of the money.

Petitioner's license was reinstated by the state Racing Board in July, 1989 at which time he applied for racing and training privileges at Yonkers Raceway. YRC denied his application.[5]

At petitioner's request, YRC management officials met with petitioner to discuss the decision. Robert Galterio, YRC's general manager, advised petitioner that he was denied racing privileges because of management's serious questions concerning his integrity arising from the very troubling facts surrounding his October 9, 1986 state suspension.[6] Petitioner was advised that it was the

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[4] Unlike thoroughbred horse races which employ a fixed starting gate, harness races are started through the use of a "pace car" which slowly circles the track until the participant horses gradually assemble behind it in designated spots or "holes". The race commences when the pace car reaches the designated starting line, at which point it pulls away from the field and off the track.

[5] State officials from the Racing Board had no involvement whatsoever in YRC's decision.

[6] Petitioner was also advised that ongoing disruptive litigation with third parties over the ownership of certain horses was a factor in YRC's decision.

decision of YRC management that his participation in harness racing at Yonkers Raceway was not in the best interest of either Yonkers Raceway or harness racing in general. Approximately one week later petitioner was advised that he was permanently barred from the Raceway's premises.[7]

Since then, plaintiff has been free to apply for privileges to drive and train harness racehorses at the five remaining New York State licensed harness racetracks, as well as the Meadowlands Racetrack located in nearby East Rutherford, New Jersey.

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[7] Petitioner's characterization of the alleged substance of petitioner's discussion with YRC officials and YRC's motivation behind the denial of racing and training privileges is a gross misstatement of fact. There is absolutely no evidence supporting petitioner's bald assertion that (1) he was not advised of the reasons of management's decision, (2) that management threatened to "black list" him from the racing industry in the event he did not withdraw his application for racing privileges, or (3) that management's decision was based upon the fact that petitioner testified on behalf of another harness race driver. Each of these allegations was rejected by both the Court of Appeals and District Court as being totally without factual foundation. (Petitioner's Appendix ("PA") 21a, 42a). Furthermore, petitioner has mischaracterized the substance of the District Court's decision in *Daigneault v. Yonkers Racing Corp.*, No. 89 Civ. 6725 (S.D.N.Y., 1989) (Goettel, J.). The District Court denied the plaintiff harness race driver's motion for a preliminary injunction but ordered that a due process hearing be conducted on the grounds that plaintiff was entitled to such a hearing under the terms of a stipulation of settlement previously entered into by the parties in a prior lawsuit. Following the conduct of said hearing, a written decision was issued by the hearing officer affirming YRC's denial of racing and training privileges to Daigneault.

SUMMARY OF ARGUMENT

As the private owner and operator of a New York harness racetrack, YRC has the common law and statutory right to decide who, among those licensed to drive, train and own harness racehorses by the state Racing Board, may participate in harness racing conducted at its racetrack so long as that decision is not based upon impermissible discriminatory grounds not applicable here.

In order to uphold the integrity of harness racing at Yonkers Raceway and maintain the confidence of the betting public essential to protect its multi-million dollar investment, YRC grants racing and training privileges only to those individuals it believes in its business judgment will foster honest, competitive harness racing.

Petitioner is a journeyman harness racehorse owner, driver and trainer of marginal ability and highly suspect integrity. Petitioner's state license was suspended on two separate occasions for serious violations of applicable state racing law, the most recent suspension arising from petitioner's involvement in a race fixing incident.

In excluding petitioner from its racetrack, YRC was exercising its common law and statutory right as the private owner and operator of Yonkers Raceway and did not, we submit, engage in "state action" for the purposes of 42 U.S.C. §1983.

The State of New York's extensive regulation of harness racing is insufficient to transform YRC's exclusion of

petitioner into "state action". Mere regulation, no matter how substantial, is not sufficient to transform a business decision of a privately owned and operated corporation into state action. The decision of the Court of Appeals to this effect is wholly consistent with both prior precedent of this Court, as well as every Circuit Court of Appeals which has considered the "symbiotic relationship"/"state action" issue in the context of privately owned and operated racetracks. For the foregoing reasons, Hadges' petition should be denied.

ARGUMENT

THE WRIT SHOULD BE DENIED

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING THE WRIT SINCE THE SECOND CIRCUIT'S OPINION IS CONSISTENT WITH THE PRECEDENTS OF THIS COURT

Petitioner's state action argument is based solely upon the "symbiotic relationship" test enunciated in *Burton v. Wilmington Park Authority*, 365 U.S. 715, 725 (1961). Petitioner argues that New York State's extensive regulation of YRC's racing and wagering activity constitutes a symbiotic relationship between YRC and the State, thereby transforming into state action YRC's expulsion of petitioner from its racetrack.

Petitioner has seriously mischaracterized the nature of the state's regulation. While the state's regulation is concededly extensive, it does not extend to private management decisions involving, among other subjects, who

is to be permitted to participate in racing activities at the Raceway.

It has long been the common law of New York that an operator of a privately owned racetrack, such as YRC, has the absolute right to exclude any person from its racetrack without cause, so long as the exclusion is not based upon race, creed, color or national origin. *Madden v. Queens County Jockey Club, Inc.*, 296 N.Y. 249, *cert. denied*, 332 U.S. 761 (1947); *People v. Licata*, 28 N.Y.2d 113 (1971); *Presti v. New York Racing Association, Inc.*, 46 A.D.2d 387 (2d Dep't., 1975); *Vaintraub v. New York Racing Assoc., Inc.*, 28 A.D.2d 660 (1st Dep't., 1967); *Gottlieb v. Sullivan County Harness Racing Association*, 25 A.D.2d 798 (3d Dep't., 1966).

Upon the passage of the New York State Racing Law, this common law right was specifically recognized and codified in §4119.8 of Title 9 of the New York Code of Rules and Regulations, which states in pertinent part:

> *Nothing contained in this section shall diminish the right of any track to exclude any person as a patron or otherwise without reason provided such exclusion is not based upon race, creed or national origin."* (Emphasis added).

Accordingly, regardless of the extensive state regulation of racing activities at Yonkers Raceway, the right to determine who participates in those activities, among the hundreds of individual state license holders, has always been reserved to the private owners and operators of harness racetracks.

This makes perfect sense. YRC has invested over $65,000,000.00 in its racetrack. The success of that investment is directly related to the public's perception that the harness racing is honest and above board. Therefore, respondent must and does have the unfettered right to choose who, among the multitude of people licensed to own, drive and train harness racehorses, will be allowed to participate in racing at its racetrack. This decision is and should be based upon the particular individual's racing talent and integrity.

Petitioner is a journeyman of marginal ability. His past criminal record and recent state suspension from racing raise serious doubts about his integrity. The Raceway has an overabundance of capable and honest licensed owners, drivers and trainers who want to participate in harness racing at Yonkers Raceway. Quite simply, YRC neither needs nor wants petitioner's participation.[8]

The decision of the Second Circuit is wholly consistent with this Court's prior precedent. It is well settled that state regulation, though "extensive and detailed", is not sufficient to create a symbiotic relationship for state

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[8] YRC respectfully submits that petitioner's state license does not grant him an absolute, unqualified right to compete in harness racing at Yonkers Raceway. A state license merely represents that an individual is qualified to seek racing privileges at the various licensed racetracks. However, racetracks' need only a limited number of owners, trainers and drivers to conduct their racing activities. To hold that a state license constitutes an absolute right to race at every licensed track would force racetracks to accept every license holder, regardless of ability or integrity or the racetrack's need and/or capacity to do so.

action purposes. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974) (privately owned utility company subject to extensive state regulation and taxation not state actor); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (extensive state regulation of privately owned nursing home insufficient to create state action). Petitioner's entire state action argument is based upon New York's regulation of YRC. However, in light of this Court's precedent, this is insufficient to create a "symbiotic relationship" necessary for a finding of state action under *Burton*.

Petitioner's reliance upon *Burton* is misplaced. This Court has expressly limited "the actual [Burton] holding to lessees of public property." *Jackson*, 419 U.S. at 358. Since YRC purchased and operates Yonkers Raceway with its private funds, *Burton* is inapplicable.

Moreover, we respectfully submit that the distinction between *Burton* and the instant matter is readily apparent. Unlike *Burton*, the state does not have a proprietary interest in the Raceway, which was purchased and is maintained by private, not public, dollars. The state does not have a neighboring, interrelated business present as in *Burton* and as such, lacks a direct financial stake in the Raceway's success. Finally, unlike the *Burton* restaurant, the Raceway does not enjoy the state's tax-exempt status. To the contrary, a substantial portion of the revenue generated by YRC from pari-mutuel racing activities is paid to the state in the form of taxation. Therefore, *Burton* is easily distinguishable.

The Second Circuit's decision is also in accord with every Circuit Court of Appeals which has considered this

issue. Each court has held that even extensive state regulation of privately owned and operated racetracks does not satisfy the symbiotic relationship test enunciated in *Burton*. *Bier v. Fleming*, 717 F.2d 308, 311 (6th Cir., 1983) *cert. denied*, 465 U.S. 1026 (1984); *Roberts v. Louisiana Downs, Inc.*, 742 F.2d 221, 225 (5th Cir. 1984); *Fitzgerald v. Mountain Laurel Racing, Inc.*, 607 F.2d 589, 596 (3d Cir. 1979) *cert. denied*, 446 U.S. 956 (1980); *Heflin v. Kentucky State Racing Comm.*, 701 F.2d 599 (6th Cir. 1983); *Fulton v. Hecht*, 545 F.2d 540, 542 (5th Cir.), *cert. denied*, 430 U.S. 984 (1977).

Petitioner's assertion that YRC merely exercised power delegated to it by the state in excluding him from Yonkers Raceway is a misstatement of law. As noted previously, the common law of the State of New York gives privately owned racetracks the absolute right to exclude any person from its racetrack without cause so long as the exclusion is not based upon impermissible grounds. In codifying the common law, the New York Legislature did not delegate this authority to private racetracks but rather, as recognized by the Court of Appeals, simply recognized this pre-existing common law right. (PA 19a). As such, in excluding petitioner, YRC was not exercising power delegated to it by the state as contemplated in *Jackson*, 419 U.S. at 352-353.

Finally, petitioner's state racing license has been restored and he is and has always been free to pursue racing opportunities at the other New York harness racetracks, as well as in New Jersey. His claim that the Raceway's refusal to grant him racing privileges constitutes a *de facto* revocation of his license is spurious. Petitioner's inability to obtain racing privileges elsewhere, if true, is a

reflection of others' independent recognition of his marginal ability and highly suspect integrity rather than a *de facto* revocation of his racing license.

CONCLUSION

Since the decision of the Second Circuit is wholly consistent with this Court's past precedent, as well as each Circuit Court which has considered the issue presented, there are no special or important reasons warranting the grant of the petition before the Court. Accordingly, respondent respectfully submits that the petition should be denied.

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Respectfully submitted,

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